No. 89-640

In The
Supreme Court of the United States
October Term, 1989

Manuel Lujan, Jr., Secretary of the Interior, *et al.*, *Petitioners*,
v.
National Wildlife Federation, *et al.*, *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

BRIEF OF *AMICI CURIAE* NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC LANDS COUNCIL, AND AMERICAN SHEEP INDUSTRY ASSOCIATION, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of this Court, *amici curiae* National Cattlemens' Association (NCA), the Public Lands Council (PLC), and the American Sheep Industry Association (ASI) file this *amicus curiae* brief in support of Petitioners. The parties, Petitioners, Secretary Manuel Lujan, Jr., *et al.*, and Respondent, National Wildlife Federation, have consented to this brief and the consent letters are attached. *Amici* urge this Court to reverse the decision of the Court of Appeals for the Circuit of the District of Columbia and to affirm the decision of the District Court dismissing Respondent's case for lack of standing to sue.

INTEREST OF *AMICI CURIAE*

Amicus curiae National Cattlemen's Association is a non-profit trade association that speaks on behalf of all segments of the nation's beef cattle industry and represents approximately 230,000 professional cattlemen. NCA provides the industry an organization in which members work together to protect the industry and to solve its problems in the national economy. A number of NCA members graze cattle on federal land under grazing leases or permits.

Amicus curiae Public Lands Council is a non-profit organization representing 27,000 members who hold leases and permits to graze sheep and cattle on federal land. PLC represents its members' interests with specific emphasis on federal land matters.

Amicus curiae American Sheep Industry Association is a non-profit organization representing 115,000 producers of wool and lamb in legislative and regulatory matters. ASI also promotes marketing efforts with research, education, and communication activities. Many ASI members graze their sheep under authority of federal grazing leases or permits.

Amici curiae members graze sheep and cattle on federal land pursuant to grazing leases or permits from the Bureau of Land Management (BLM) or the Forest Service of the Department of Agriculture. *Amici* members also appropriate water pursuant to state law for their ranch operations. NCA, PLC and ASI members work daily with federal agencies and the resources on federal lands. These members build and maintain water projects that provide water for sheep, cattle, and wildlife.

NCA, PLC, and ASI and their members have a stake in the public land use and procedural issues raised in this litigation. For instance, among the more than 1,000 transactions at issue, Respondents challenge revocation of Executive Orders that impose federal control on hundreds of springs and water holes throughout the West. These reservations may conflict with *amici* members' right to use water under state water law.

Amici organizations and their members are also affected by the procedural question concerning the specificity of evidence necessary to empower an environmental organization to challenge federal agency

action. The importance of federal lands to many *amici* members' businesses leads to conflicts between agency actions, policies, and programs and the interests of the livestock grazing industry. *Amici* have challenged the agency action and have been required to specifically show that their interests are affected and that they are entitled to bring suit. In other instances, *amici* must intervene to defend agency action against challenges similar to the one before this Court. When appropriate, *amici* have raised issues as to whether environmental groups have specifically shown they have standing. Consistent application of the standing to sue criteria is very important in *amici* efforts to protect their interests in federal land resources and water.

SUMMARY OF ARGUMENT

1. *Amici* urge this Court to reverse the decision of the Court of Appeals (*National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) hereafter *Burford II*)[1] and to affirm the district court's decision to dismiss the case for lack of standing to sue. *Amici* will only address the inequities and problems that the court of appeals created when it concluded that the district court should have considered the four

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[1] The court of appeals in *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C. Cir. 1988) (hereafter *Burford I*) upheld the district court's decision to issue a preliminary injunction.

supplemental affidavits and concluded that Respondent established standing to sue.[2]

2. Standing to sue is a threshold question and Respondents were obligated to address it when it was initially raised in the cross-motions for summary judgment, not three years later. The district court reasonably limited its review to the first three affidavits that have had the benefit of rebuttal. It is fundamentally inequitable to permit Respondents who objected to discovery about its claim of injury in fact to later supplement the record.

3. The decision also fails to take into account that throughout the case, defendants raised fundamental questions about the accuracy of Respondent's allegations. In some instances, the affidavits do not accurately portray the impact of the decisions on Respondent's interests. It is inappropriate for these affidavits to be used as the basis of standing when in fact there are real questions as to their sufficiency.

4. The Court of Appeals creates a double standard for challenging government action, the traditional standard for the business community and a more lenient one for the environmental community. No statute or decision of this Court permits an environmental group to resist inquiry into the facts

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[2] *Amici* fully concur in the Petitioners' brief on the merits and have chosen to address this issue in order to avoid duplication as provided in Rule 37 of this Court.

claimed for standing to sue and then file "corrective" affidavits more than two years later.

ARGUMENT

I.

NOTIONS OF FAIRNESS REQUIRE THE CONCLUSION THAT THE SUPPLEMENTAL STANDING AFFIDAVITS SHOULD NOT HAVE BEEN CONSIDERED

Notions of fairness and estoppel require that the supplemental affidavits not be considered in finding that Respondents proved their standing to sue.

This case concerns the evidence necessary for an environmental organization to establish injury in fact, the first component of standing to sue.[3] The question is whether the Respondents by affidavit established that at least one member had standing to sue.

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[3] Standing to sue is often articulated as actual or threatened injury in fact due to challenged conduct, and the injury is fairly traced to that conduct and likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The injury in fact element also coincides with injury in fact necessary to challenge agency conduct. *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1331 (D.C. Cir. 1986).

The district court and the court of appeals in *Burford II* considered two sets of affidavits supporting Respondent's standing to sue. The first set were filed in April, 1986. *See* Affidavits by Peggy Kay Peterson, App. 190a; Richard Loren Erman, App. 187a; and Lynn Greenwalt, App. 193a. The supplemental affidavits were filed in 1988 following the hearing on summary judgment. *See* Affidavits by David Doran, Respondents App. 1, Merlin McColm, Respondents App. 4, A.L. Ouellette, Respondents App. 11, Stephen Blomeke, Respondents App. 7, and Peggy Kay Peterson, Respondents App. 15.

The question of whether Respondent had standing to sue was not before the court of appeals which only reviewed the preliminary injunction and concluded that Respondents had met the minimum necessary at that stage of the case.

The district court did not consider whether even the first three affidavits established standing to sue until 1988 in the context of motions for summary judgment.[4] *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988), App. 158a. At that time, the court concluded that the affidavits failed to state

[4] The Court of Appeals incorrectly concludes that the district court had found that the Respondent had standing based upon the affidavits Respondent filed in support of its motion for summary judgment. This is incorrect. The affidavits were not before the district court when it ruled on the motions to dismiss or the preliminary injunction.

specific facts necessary to show injury in fact. *Id.* at App. 34a to 37a.

Respondent offered the supplemental affidavits in response to the flaws identified by defendants in their briefs and at the summary judgment hearing. The district court refused to consider them because they exceeded the scope of this order and were filed long after the motion for summary judgment and initial briefing had been completed.

The district court correctly concluded that Respondent had ample opportunity to establish its standing and could properly be held to the record then before the court. Subsequent events support the correctness of the court's conclusion.

In 1986, Respondent resisted any inquiry into the facts stated in the affidavit by obtaining a protective order from the court denying discovery. Respondent took the position that the affidavits were sufficient and any discovery would be only cumulative and therefore abusive.

Respondents' assertion that they were surprised by the standing issue being raised in the district court is not credible. The issue of standing is jurisdictional and can be raised at any time. The issue was pursued in the briefs on the motions for summary judgment. Defendants provided information contradicting Respondent's claim that the withdrawal revocations and the classification terminations were really the cause of Respondent's concerns.

Respondents chose not to address these identified defects with supplemental affidavits when it could have within the briefing schedule set by the district court.

The utilization of supplemental affidavits are shielded from scrutiny to support standing renders the Constitutional requirement that a party must be "directly harmed" meaningless *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685 (1973), and fundamentally unfair.

II.

THE SUPPLEMENTAL AFFIDAVITS CANNOT BE ACCEPTED UNCRITICALLY

Petitioners repeatedly argued, and the district court correctly concluded, that the affidavits and Respondent's allegations vastly overstated the scope of the actions on their members' interests. As a result, the district court held that Respondent failed to prove its injury in fact with the requisite specificity.

This is not a matter of arguing that Respondent's affiants do not correctly state the facts, but that their conclusions that the withdrawal revocation or the classification termination is the cause of the threatened development.

For instance, Petitioners established that the Wyoming classification termination for the South Pass/Green Mountain area in Wyoming encompassed

2 million acres, but that less than 4500 were in fact previously closed to mining and were recently opened. Thus, an allegation by Respondent member Peterson that she sued land in the vicinity of the 2 million acres area was meaningless.

This was equally true for the Arizona Strip withdrawal revocation that involved almost 2 million acres, less than 23,000 of which were opened to metalliferous mining. The entire area was previously open to metalliferous mining.

The supplemental affidavits suffer from the same problem. For instance, Merlin McColm complains that Executive Order water reserves were revoked and now mining is causing sedimentation and degradation of the wildlife habitat. Respondent's Opposition to Petition for Writ of Certiorari, App. 4, ¶ 7. These facts may be independently true. However, the mining in this area is gold mining, a metalliferous metal. This has always been permissible and the withdrawal revocation that only opened the land to mining for non-metalliferous metals did not affect the status of the land. Thus, the claimed injury, mining's impacts on Respondent's member, has nothing to do with the challenged withdrawal revocation.

Similar questions are raised with respect to the other affidavits. For instance, Stephen Blomeke complains about the withdrawal revocations in Colorado opening campgrounds and recreation areas to mining. Respondent's Opposition to Petition for a Writ of Certiorari, App. 7, ¶ 8. The order in question revoked

the withdrawals, because the construction of campgrounds anticipated never occurred. Similarly, A.L Ouellette complains about the revocation of orders protecting the Tent Rocks Picnic Area and other areas in the Gila National Forest. Respondent's Opposition to Petition for a Writ of Certiorari, App. 11, ¶ 7. However, the Gila National Forest order did not open land to mining and mineral leasing, because those uses had always been permitted. The order only protected the land from operation of sale and exchange laws that were repealed in 1976 with passage of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, n. 702.

Amici does not intend by this discussion to conclusively rebut Respondent's affidavits. However, it shows the flaws in permitting the use of such affidavits at the end of a case, when the Respondent has resisted any inquiry into the facts alleged and there is no opportunity to test the accuracy of the statements.

CONCLUSION

This is an important case raising important procedural issues. The presence of substantive issues should not outweigh the inquiry into whether the case is suitably postured for federal court adjudication. The decision of the court of appeals opens the door to abuse of the standing criteria by sharply limiting inquiry into stated bases for injury in fact and permitting last minute supplemental filings that cannot be effectively examined and questioned. In short, the court of appeals reduces the standing to sue requirement to a

pro forma matter that can be cured by magic words. The decisions of this Court impose a much more stringent standard and *amici* urge this Court to reverse the decision of the court of appeals.

Respectfully submitted

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